STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER JANE KENNEDY, Plaintiff-Appellant, v ROBERT LEE AUTO SALES, Defendant-Appellee.	FOR PUBLICATION November 24, 2015 9:05 a.m. No. 322523 Ingham Circuit Court LC No. 13-001377-CZ Advance Sheets Version

Before: METER, P.J., and BORRELLO and BECKERING, JJ.

BECKERING, J.

This case arises out of the sale of a car. Plaintiff Jennifer Jane Kennedy alleged, among other things, that defendant Robert Lee Auto Sales violated the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq*., and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*.[1] The parties reached a settlement agreement under which plaintiff received all of her money back and defendant agreed to pay plaintiff's statutory attorney fees and costs, which were ultimately determined by the trial court. Plaintiff appeals as of right the trial court's order awarding her $1,000 in attorney fees and costs. Plaintiff contends that the trial court abused its discretion by arbitrarily awarding $1,000 without considering the remedial purpose of the fee-shifting provisions of the MMWA and the MCPA, as well as other factors set forth by the Michigan Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), when it calculated a reasonable attorney fee. We agree, and thus, we vacate and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 31, 2012, plaintiff purchased a 2003 Chevrolet Impala from defendant. Plaintiff made a down payment of $2,200 and entered into a retail installment contract for the remaining balance. She also granted defendant a security interest in the car. Defendant

[1] Robert Lee Auto Sales assigned its retail installment contract and security agreement with plaintiff to Consumer Portfolio Services, Inc. (CPSI). CPSI sued plaintiff in district court, after which plaintiff filed a counterclaim against CPSI and a third-party complaint against defendant. The case was eventually removed to the Ingham Circuit Court.

subsequently assigned the retail installment contract and security agreement to Consumer Portfolio Services, Inc. (CPSI).

Plaintiff made only two payments on the retail installment contract before defaulting. On August 9, 2013, CPSI filed suit against plaintiff in district court, alleging breach of contract and seeking possession of the car. Plaintiff[2] responded to the complaint by filing an answer, a counterclaim, a third-party complaint, and a motion for removal to the Ingham Circuit Court. Plaintiff's third-party complaint raised several claims against defendant, including that defendant violated the MMWA and the MCPA.[3] In November 2013, the case was removed to the Ingham Circuit Court by stipulation of the parties.

CPSI and plaintiff reached a settlement agreement in which CPSI cancelled plaintiff's debt and deleted the matter from her credit history, and plaintiff promised to return the vehicle to CPSI after her claims against defendant were resolved. The trial court dismissed the claims against CPSI, and the case continued between defendant and plaintiff.

On January 30, 2014, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Noting that one of the counts in plaintiff's complaint sought rescission of the sales contract, defendant offered to refund plaintiff's down payment of $2,200 in exchange for the return of the vehicle.[4] Defendant also argued that plaintiff's remaining claims were meritless.

At a hearing on the motion for summary disposition, plaintiff's counsel stated that among other relief, plaintiff was seeking a refund of the down payment and the payments she made on the contract before defaulting. The trial court suggested that the parties attempt to reach a settlement in the case. After a short break in the proceedings, the parties agreed to settle the case for $2,675.18, which was the amount of plaintiff's down payment plus the two monthly installment payments she had made. In addition, with respect to the "statutory attorney fees" plaintiff sought under the MMWA and MCPA, the parties agreed to "allow the Court to make that decision." The trial court expressly asked Robert Lee, the owner of defendant company, whether he understood and agreed to the settlement, which would allow the court to decide the amount of fees to be awarded. Lee answered, "I think you can do a fair job, yes, sir." With regard to attorney fees, the parties stated that they would attempt to work out the amount of fees owed without the court's involvement, but if they could not, plaintiff would petition the court to

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[2] For the sake of consistency, we will refer to plaintiff in this case as "plaintiff," regardless of her designation in the district court action. We will also apply the same protocol to defendant.

[3] In addition to other allegations of wrongdoing, plaintiff claimed that contrary to defendant's specific representations to her about who had previously owned the vehicle and the condition it was in when she purchased it, defendant knew or should have known that the vehicle had been involved in a serious collision resulting in damage so extensive that the vehicle was unsafe to operate on the public highways.

[4] It is unclear which party will end up with possession of the vehicle. CPSI is entitled to possession of the vehicle under the terms of plaintiff's settlement with CPSI. Defendant could ultimately take possession of the vehicle if CPSI relinquishes its possession of the vehicle.

determine the fee award. The trial court entered a written order memorializing the settlement and stating, with regard to attorney fees, that "in the event that the parties are unable to resolve the amount of statutory attorney fees and costs on their own, Plaintiff's counsel shall notify the Court so that a briefing and hearing schedule may issue[.]"

In the months that followed, the parties were unable to resolve the amount of attorney fees, causing plaintiff to file a "Petition for Assessment of Statutory Costs and Attorney Fees Pursuant to Settlement Agreement." Citing the factors set forth in *Smith*, plaintiff requested a total of $14,943.04—$14,267.50 in attorney fees and $675.54 in costs. Attached to the petition were several documents, including billing records for this case, the 2010 Economics of Law Practice Survey published by the State Bar of Michigan, and caselaw applying the MMWA.

Defendant responded that plaintiff's costs and fees should be limited to $891.72, which was 1/3 of plaintiff's recovery against defendant. Any other amount, according to defendant, "would be unfair and inequitable[.]" Defendant claimed that this is the amount that plaintiff "would have actually been charged" to defend defendant's motion for summary disposition. Implicit in this argument was the idea that defendant should not be liable for paying attorney fees plaintiff incurred in the proceedings involving CPSI.

After hearing brief arguments from the parties at a June 4, 2014 hearing, the trial court stated that it was awarding plaintiff $1,000 in costs and attorney fees:

> THE COURT: Okay. Let me just say, this kind of an attorney fee billing on a case as nickel and dime as this is far beyond what I would ever allow in a lawsuit, nor do I feel it's a fair amount at all. You are awarded a thousand dollars.
>
> I might also add, there is nothing in this settlement or agreement here that there was any violation of the Consumer Protection Act. The mere fact that you sue under an act is no determination by this Court [that] there was a violation, with all due respect. You get a thousand dollar attorney fee. Thank you.

The trial court subsequently entered a written order awarding plaintiff $1,000 in costs and attorney fees.[5] Plaintiff now appeals the order as of right.

II. ANALYSIS

We review the trial court's award of attorney fees for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. Plaintiff argues that the trial court's award of attorney fees was an abuse of discretion because (1) the trial court failed to apply the framework set forth by our Supreme Court in *Smith*, and (2) the trial

[5] We note that the trial court's $1,000 award was for both costs and attorney fees. Plaintiff's petition stated that her costs in the action were $675.54. If true, this left an attorney-fee award of only $324.46.

court failed to consider the remedial purpose of the fee-shifting provisions of the MMWA and the MCPA.

A. PLAINTIFF'S ENTITLEMENT TO ATTORNEY FEES

We begin our analysis by briefly touching on plaintiff's entitlement to attorney fees. Although the trial court awarded attorney fees to plaintiff, it appeared to doubt plaintiff's entitlement to such fees, noting that nothing in the settlement agreement established a violation of the MCPA, and that "[t]he mere fact that you sue under an act is no determination by this Court [that] there was a violation . . . ." On appeal, defendant also appears to contest plaintiff's entitlement to attorney fees.

On this point, we agree with plaintiff that the facts of this case are substantially similar to the facts of *LaVene v Winnebago Indus*, 266 Mich App 470; 702 NW2d 652 (2005). In *LaVene*, the plaintiffs sued the defendants under the MCPA and the MMWA, both of which provide for an award of attorney fees and costs. *Id*. at 472, 477-478. See MCL 445.911(2) ("Except in a class action, a person who suffers loss as a result of a violation of [the MCPA] may bring an action to recover actual damages or $250.00, whichever is greater, *together with reasonable attorneys' fees*.") (emphasis added); 15 USC 2310(d)(2) (allowing the recovery of costs, expenses, and attorney fees in an action under the MMWA). The parties reached a settlement agreement in which the defendants agreed to pay the attorney fees and costs owed to the plaintiffs under statute or court rule. *LaVene*, 266 Mich App at 472. The settlement provided that if the parties could not agree on the amount of fees and costs, the trial court would decide the matter. *Id*. The parties could not agree on the appropriate amount of fees and costs. *Id*. The defendants argued that the court could not award attorney fees or costs because the plaintiffs were not a "prevailing party," given that there was a settlement between the parties, but no judgment against the defendants. *Id*. at 473. In rejecting that argument, this Court noted that MCR 2.625(H) recognized that taxation of costs could be reserved in a settlement. *LaVene*, 266 Mich App at 474. This Court also concluded that the defendants' argument was "a moot point, if not disingenuous" because the defendants agreed to pay the plaintiffs whatever costs to which they were entitled. *Id*.

The facts of the case at bar are essentially the same. Plaintiff sued defendant under the MCPA and MMWA, and the parties reached a settlement in which they agreed that if they could not determine the amount of "statutory attorney fees and costs on their own," the trial court would decide the matter. Thus, any argument that plaintiff was not entitled to statutory attorney fees because there was no judgment against defendant is without merit. See *id*.

B. DETERMINING WHETHER *SMITH v KHOURI* APPLIES TO THIS CASE

We next turn our attention to whether the framework established by our Supreme Court in *Smith* applies to the award of attorney fees in this case. For the reasons discussed below, we hold that it does, and that the trial court's award of attorney fees, rendered with virtually no explanation or examination of the relevant factors, was an abuse of discretion. In doing so, we note our belief that the *Smith* framework applies to all fee-shifting statutes, even though other panels of this Court have disagreed with that position. However, given our conclusion that there is no binding authority to prevent *Smith* from applying in this particular case, we find it

unnecessary to declare a conflict with those prior decisions.[6] Furthermore, even if the *Smith* framework did not apply, we would hold that the trial court's cursory explanation for the award of attorney fees in this case was an abuse of discretion.

1. OUR SUPREME COURT'S DECISION IN *SMITH v KHOURI*

In general, a party is not entitled to an award of attorney fees and costs unless such an award is expressly authorized by statute or court rule. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). At issue in *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.), was an award of attorney fees under MCR 2.403 as case-evaluation sanctions, and the factors to be applied in calculating such an award. The lead opinion[7] in *Smith* noted that the party seeking fees has the burden of establishing the reasonableness of the requested fees. *Id*. at 528-529. Next, the lead opinion explained that in assessing reasonableness, our courts traditionally considered the following six factors set forth in *Wood v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982):

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.), quoting *Wood*, 413 Mich at 588.]

In addition, explained *Smith*, courts have traditionally considered the following eight factors found in Michigan Rule of Professional Conduct (MRPC) 1.5(a), some of which overlap the *Wood* factors:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

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[6] Moreover, declaring a conflict is unnecessary because we are bound to follow our Supreme Court's decision in *Smith* rather than the conflicting decisions from this Court. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48-49; 840 NW2d 775 (2013).

[7] Chief Justice TAYLOR authored the lead opinion in *Smith* and was joined by now-Chief Justice YOUNG. Justice CORRIGAN, joined by Justice MARKMAN, filed a concurring opinion which "concur[red] with the reasoning and result of the lead opinion, with one exception." *Smith*, 481 Mich at 538 (CORRIGAN, J., concurring). The "one exception" concerned the elimination of certain factors to consider when determining a reasonable attorney fee for case-evaluation sanctions; the exception is not pertinent to our discussion of the issues in this case. Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissented in *Smith*.

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent." [*Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), quoting MRPC 1.5(a).]

Citing *Wood*, 413 Mich at 588, the lead opinion in *Smith* also noted that "[t]he above factors have not been exclusive, and the trial courts should consider any additional relevant factors." *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.).

After setting forth the factors in *Wood* and in MRPC 1.5(a), the lead opinion in *Smith*, 481 Mich at 530, announced that "our current multifactor approach needs some fine-tuning." As the initial step in determining the reasonableness of an attorney-fee award, the lead opinion concluded, "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a)." *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.). Next, the court should multiply the customary fee "by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*.)" *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.) (alteration in original). The product of these numbers "serve[s] as the starting point for calculating a reasonable attorney fee." *Id*. This starting point, explained the lead opinion, was designed to "lead to greater consistency in [fee] awards." *Id*. After determining the appropriate starting point, the court "should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate." *Id*.

2. THE REACH OF *SMITH*'S FRAMEWORK AND THE "STARTING POINT" FOR ASSESSING REASONABLENESS

As noted, the Court in *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.), framed the issue to be decided in that case as one involving an award of case-evaluation sanctions under MCR 2.403(O). The opinion also noted that MCR 2.403(O)(6) defined "actual costs" as including " 'a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation . . . .' " *Smith*, 481 Mich at 527 (opinion by TAYLOR, C.J.), quoting MCR 2.403(O)(6).[8] In addition, the opinion discussed the purpose of imposing case-evaluation sanctions. *Smith*, 481 Mich at 527-528 (opinion by TAYLOR, C.J.). In particular, the opinion explained that MCR 2.403(O)(6) is a fee-shifting provision designed "to encourage the parties to seriously consider the evaluation and provide financial penalties to the party that, as it develops, 'should' have accepted [the case-evaluation award] but did not." *Smith*, 481 at 527-528 (opinion by TAYLOR, C.J.). This type of

[8] This "hours times rate" focus bears an unmistakable resemblance to the "starting point" created in *Smith*.

"encouragement" helped to not only foster settlements, but "also [to] shift[] the financial burden of trial onto the party who imprudently rejected the case evaluation." *Id*. at 128.

However, not all of the language in *Smith* was so limited to case-evaluation sanctions. For instance, the Court began its analysis in *Smith* by describing the multifactor approach commonly used by courts to determine the reasonableness of an attorney-fee award—an approach that applied to all attorney-fee awards—and admitted that the "current multifactor approach need[ed] some fine-tuning." *Id*. at 530. In announcing that such "fine-tuning" was needed, the opinion made virtually no mention of case-evaluation sanctions again, and it did not specify that this new approach was limited to cases involving attorney fees awarded as case-evaluation sanctions. In fact, after stating that this "fine-tuning" was expected to provide "greater consistency in awards," *Smith* did not specify that this "greater consistency" was only meant for attorney fees awarded as case-evaluation sanctions. And when the Court later summarized the new rule it had established, the lead opinion simply announced a rule that "a trial court" should use for "determining *a reasonable attorney fee*"; the lead opinion did not mention case-evaluation sanctions or state in any way that the new framework should only be applied to cases involving case-evaluation sanctions. *Id*. at 537 (emphasis added).

Moreover, in response to criticisms levied by the dissent in *Smith*, the lead opinion stated that it sought to provide a framework that could apply to Michigan's other fee-shifting statutes. *Id*. at 535-536. For instance, the lead opinion acknowledged that selecting a reasonable hourly rate to use in calculating an attorney-fee award was "not an exact science . . . ." *Id*. at 535. The lead opinion stated that it "merely aim[ed] to provide a workable, objective methodology for assessing reasonable attorney fees *that Michigan courts can apply consistently to our various fee-shifting rules and statutes*." *Id*. (emphasis added). The lead opinion further stated that its discussion was intended as guidance on fee-shifting statutes in general. The lead opinion criticized the dissenting justices for offering "no rubric to guide Michigan courts," and it emphasized that "[u]nlike the dissent, we choose to provide the guidance that has been, and the dissent would allow to remain, sorely lacking for the many Michigan courts that are asked to *impose 'reasonable attorney fees' under our fee-shifting rules and statutes*." *Id*. at 536 (emphasis added).

Yet not all of the justices were convinced that the lead opinion was clear with regard to when the new framework set forth in *Smith* should apply. Among other concerns expressed in his dissenting opinion, Justice CAVANAGH took issue with the lead opinion for its lack of clarity in this regard:

> Does this now mean that the third factor of MRPC 1.5(a) is the starting point for all proceedings under that provision of our ethical code? Further, does this new rule apply to other fee-shifting provisions? For example, does the majority's test apply to the fee-shifting provisions of the Uniform Condemnation Procedures Act, MCL 213.66, and the Michigan Civil Rights Act, MCL 37.2802, each of which involves reasonable attorney fees? And if today's rule only applies to MCR 2.403, what is the basis for such a limited application of the new rule? [*Smith*, 481 Mich at 555 (CAVANAGH, J., dissenting).]

3. POST-*SMITH* DEVELOPMENTS

In two post-*Smith* orders, our Supreme Court applied the *Smith* framework to cases involving attorney fees awarded in Freedom of Information Act (FOIA) cases and Headlee Amendment cases. *Coblentz v Novi*, 485 Mich 961 (2009); *Adair v Michigan*, 494 Mich 852 (2013). The *Smith* analysis begins with multiplying a reasonable number of hours by a reasonable hourly rate, and then making adjustments to that amount based on the *Wood*/MRPC factors. Notably, a few of the justices were critical of their colleagues in *Juarez v Holbrook*, 483 Mich 970 (2009), for failing to remand the case for reconsideration in light of *Smith*. In *Juarez*, the Supreme Court denied leave in a case involving an appeal from this Court's decision—issued one day before the Supreme Court issued its decision in *Smith*—affirming an award of case-evaluation sanctions. See *Juarez v Holbrook*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2008 (Docket Nos. 275040 and 276312). In separate dissents, Justice CORRIGAN and Justice MARKMAN would have vacated this Court's opinion affirming the fee award and remanded the case for reconsideration in light of the recently established *Smith* framework. See *Juarez*, 483 Mich 970 (CORRIGAN, J., dissenting, and MARKMAN, J., dissenting).

This Court's application of the *Smith* framework to fee-shifting statutes and court rules other than MCR 2.403 has been a source of dissension. For instance, in *Adair v Michigan (On Third Remand)*, 298 Mich App 383, 390; 827 NW2d 740 (2012), overruled in part on other grounds 494 Mich 852 (2013), a panel of this Court applied the *Smith* framework to a Headlee Amendment case. In doing so, the panel noted that the "aim" of the *Smith* framework was " 'to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes.' " *Adair (On Third Remand)*, 298 Mich App at 390, quoting *Smith*, 481 Mich at 535. At issue in *Adair* was Const 1963, art 9, § 32, which governed the costs to be awarded to plaintiffs who brought actions to enforce provisions of the Headlee Amendment. *Adair (On Third Remand)*, 298 Mich App at 388. Recognizing that a fee-shifting provision was at issue in that case, the panel applied the *Smith* framework to assess the reasonableness of the attorney-fee award. *Id*. at 390. Although our Supreme Court later reversed the *Adair* panel's decision in part, the Court did not overrule the application of *Smith*, and in fact, cited *Smith* in its order. See *Adair*, 494 Mich 852.

In addition to *Adair*, other panels of this Court have applied the *Smith* framework to various fee-shifting statutes. For instance, in *Prins v Mich State Police*, 299 Mich App 634, 645; 831 NW2d 867 (2013), the panel applied the *Smith* framework to an award of attorney fees in a FOIA case. In addition, in *Silich v Rongers*, 302 Mich App 137, 149-150; 840 NW2d 1 (2013), the panel cited to *Smith* in a case involving an award of attorney fees under MCR 3.403(C), a court rule that pertains to the sale of premises and the division of proceeds as a substitute for partition. And, although it did so in dicta, the panel in *Augustine v Allstate Ins Co*, 292 Mich App 408, 429, 434-436; 807 NW2d 77 (2011), stated that the *Smith* framework applied to an award of attorney fees under MCL 500.3148(1) of the no-fault act when a plaintiff seeks

recovery for attorney fees on an hourly (as compared to a contingent fee) basis.[9] Further, in several unpublished decisions, this Court has applied the *Smith* framework to other fee-shifting statutes and in other situations. See, e.g., *Demopolis v Jones*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2015 (Docket No. 320099) (applying the *Smith* framework when awarding attorney fees on a quantum meruit theory); *Annis v Annis*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2015 (Docket No. 319577) (applying the *Smith* framework to an award of attorney fees as sanctions under MCR 2.114); *Barker v Marshall*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2014 (Docket Nos. 308990 and 311843) (applying *Smith* to an award of attorney fees under MCL 600.2919a(1)); *Dep't of Natural Resources & Environment v Rexair, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 26, 2013 (Docket No. 297663) (applying *Smith* to the assessment of attorney fees associated with the plaintiff's postjudgment motion following a consent judgment); *C & D Capital, LLC v Colonial Title Co*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket Nos. 306927 and 308262) (applying the *Smith* framework to an award of attorney fees under MCR 2.114 and MCL 600.2591).

However, other panels have declined to apply the *Smith* framework to an award of attorney fees under fee-shifting statutes or under court rules beyond the fee-shifting rule that was at issue in *Smith*, i.e., an award of fees under MCR 2.403. For instance, in *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700, 700 n 3; 760 NW2d 574 (2008), the panel held that the *Smith* framework applied to an award of attorney fees under MCR 2.403(O), the fee-shifting provision at issue in *Smith*, but not to an award of attorney fees under MCL 500.3148(1) of the no-fault act. More recently, in *Riemer v Johnson*, 311 Mich App 632, 656-657; 876 NW2d 279 (2015), this Court declined to apply *Smith* to an award of attorney fees under MCR 3.206(C)(2)(a), which concerns domestic relations actions. The panel explained that the *Smith* framework was limited to an award of attorney fees under MCR 2.403(O), emphasizing that the issue in *Smith* concerned " 'a trial court's award of "reasonable" attorney fees *as part of case-evaluation sanctions under MCR 2.403(O) . . . .*' " *Id*. at 657, quoting *Smith*, 481 Mich at 522 (opinion by TAYLOR, C.J.). In addition, several unpublished cases, including unpublished cases dealing with an award of attorney fees under the MCPA—one of the statutes at issue in this case—have declined to apply the *Smith* framework. See, e.g., *McNeal v Blue Bird Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2014 (Docket No. 308763) (declining to apply the *Smith* framework to an award of attorney fees under the MCPA); *Stariha v Chrysler Group, LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2012 (Docket No. 301238) (declining to apply the *Smith* framework to an award of attorney fees under the MCPA and the MMWA).

[9] As will be discussed later in this opinion, another panel of this Court reached a contrary ruling in a published decision involving a contingent fee. See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700; 760 NW2d 574 (2008).

4. *SMITH* SHOULD APPLY TO THIS CASE

After considering all of the foregoing authorities, we hold that it is appropriate to apply the *Smith* framework to the award of attorney fees at issue in this case.[10] The Court's opinion in *Smith* indicated that the rule established there was to be applied to "our various fee-shifting rules and statutes" and was intended to provide guidance for "Michigan courts that are asked to impose 'reasonable attorney fees' under our fee-shifting rules and statutes." *Smith*, 481 Mich at 535-536 (opinion by TAYLOR, C.J.). In this regard, we find instructive the reasoning employed in *Adair (On Third Remand)*, 298 Mich App at 390, when applying the *Smith* framework to FOIA's fee-shifting provision. Notably, the panel in *Adair* recognized that in *Smith*, our Supreme Court stated that the "aim" of the new framework was " 'to provide a workable, objective methodology for assessing reasonable attorney fees that Michigan courts can apply consistently to our various fee-shifting rules and statutes.' " *Id.*, quoting *Smith*, 481 Mich at 535 (opinion by TAYLOR, C.J.). Likewise, in this case, because both the MCPA and the MMWA contain fee-shifting provisions, we deem it appropriate to apply the *Smith* framework. See *Smith*, 481 Mich at 535 (opinion by TAYLOR, C.J.); *Adair (On Third Remand)*, 298 Mich App at 390.

In reaching the conclusion that the *Smith* framework should apply to this and other fee-shifting statutes and court rules, we are also swayed by the pronouncement of the lead opinion in *Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), that "our current multi[]factor analysis"—that is, the multifactor analysis of the *Wood* factors and the factors in MRPC 1.5(a) used to evaluate reasonableness in attorney-fee cases—"needs some fine-tuning." The lead opinion did not cite anything pertaining to an award of attorney fees under MCR 2.403—the court rule under which fees were authorized in *Smith*—when making this proclamation; rather, the opinion simply stated that the analysis currently used to evaluate the reasonableness of attorney fees "needs some fine-tuning."[11] Given that no one disputes that the multifactor analysis applies to

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[10] We note that plaintiff's entitlement to attorney fees in this case arises from the settlement's reference to "statutory attorney fees"—attorney fees authorized by the MCPA (state law) and the MMWA (federal law). In *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97-98; 537 NW2d 471 (1995), this Court remanded the case to determine the reasonableness of attorney fees under the MCPA and the MMWA using the factors in MRPC 1.5(a). See also *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 221; 457 NW2d 42 (1990) (applying state law—the *Wood* factors—to determine the reasonableness of attorney fees awarded under the MMWA). Thus, we see fit to apply state law to determine the reasonableness of attorney fees in this instance.

[11] In this regard, we also note that the lead opinion proclaimed that this "fine-tuning" would lead to "greater consistency in awards." *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). If greater consistency were truly the goal, it would be reasonable to assume that the consistency sought was with regard to all attorney-fee awards, not just attorney fees awarded as case-evaluation sanctions. Indeed, what would be the point of announcing a rule that would lead to greater consistency in only one type of attorney-fee award, but would provide no guidance with regard to other attorney-fee awards?

an award of attorney fees under the MCPA and the MMWA, we see fit to apply *Smith*'s "fine-tuning" to the instant case.[12]

More importantly, we have found no binding authority that would act as an impediment to applying *Smith* in the context of MCPA and MMWA actions.[13] Although defendant directs our attention to this Court's decision in *Smolen v Dahlmann Apartments, Ltd*, 186 Mich App 292; 463 NW2d 261 (1990), a case that precedes *Smith* by 18 years, we do not agree that the decision in *Smolen* prevents us from applying the *Smith* framework to this case. In *Smolen*, the plaintiffs were awarded attorney fees under the fee-shifting provisions of the MCPA. *Id*. at 293-294. On appeal, the plaintiffs asked this Court to "set forth specific additional items which should be considered in determining attorney fees." *Id*. at 296. Among those "specific additional items," for which they advocated, the plaintiffs asked this Court to endorse a "starting point" for the award, which was to consist of a reasonable number of hours multiplied by a reasonable rate, and for this starting point to be "presumed to provide a reasonable fee." *Id*. at 296-297. The plaintiffs also asked this Court to hold that they were entitled to an upward adjustment in this amount "to reflect exceptional success." *Id*. at 297.

The panel in *Smolen* declined to adopt the plaintiffs' suggestions. As to the proposed starting point, the panel declined to adopt "any rigid formula . . . that fails to take into account the totality of the special circumstances applicable to the case at hand." *Id*. The panel also declined to find that a reasonable number of hours multiplied by a reasonable rate was a presumptively reasonable fee. *Id*. Further, the panel declined to find that the plaintiffs were entitled to certain upward adjustments; instead, the panel deferred to the discretion of the trial court. *Id*.

For several reasons, we decline to read *Smolen* as foreclosing our ability to use the *Smith* framework in this case. As an initial matter, even if *Smolen* could be read to prevent the application of the *Smith* framework in MCPA cases, we note that the attorney fees awarded in this case were awarded, from our review of the record, under *both* the MCPA *and* the MMWA. Indeed, the settlement in this case refers to "statutory attorney fees," and we can no sooner

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[12] While we are of the opinion that the framework established in *Smith* should apply to our various fee-shifting statutes and court rules, we need not expressly decide this broader issue and we are careful not to wade too far into these murky waters, given that this Court has reached a contrary result in two published decisions. See *Riemer*, 311 Mich App at 657; *Univ Rehab Alliance*, 279 Mich App at 700. Instead, our holding in this regard is simply that the *Smith* framework applies in this particular type of case. In other words, regardless whether the *Smith* opinion was unambiguous about its application of the *Smith* framework and regardless of the analysis in *Adair (On Third Remand)*, we would still apply the *Smith* framework to the fee-shifting provisions in the MCPA and the MMWA.

[13] As noted, there exist two unpublished decisions in which this Court found that the *Smith* framework did not apply to an award of attorney fees under the MCPA. See *McNeal*, unpub op at 14-15; *Stariha*, unpub op at 6. However, we are not bound by these unpublished decisions. MCR 7.215(C)(1).

conclude that the fees were awarded under the MCPA, than we can conclude that they were awarded under the MMWA. Given the differences in factual scenarios between this case and *Smolen*, and what the plaintiffs in *Smolen* were asking this Court to do, we find *Smolen* inapplicable. Moreover, as noted above, *Smolen* was decided almost 18 years before *Smith* was decided. We decline to find that the reasoning employed in *Smolen* could have somehow preempted the application of a case that was released nearly two decades later.[14]

In addition, we read *Smolen* as being compatible with the *Smith* framework. While *Smolen* purported to reject a "starting point" of reasonable hours multiplied by a reasonable hourly rate, it appears that the plaintiffs in *Smolen* wanted this starting point to be a much less flexible starting point than the starting point set forth in *Smith*. To that end, this Court rejected the proposed starting point as advocated by the plaintiffs in *Smolen*, because the plaintiffs pushed for a "rigid formula" that would have established a presumptively reasonable fee that "fail[ed] to take into account the totality of the special circumstances applicable to the case at hand." See *Smolen*, 186 Mich App at 297. Notably, in *Smith*, our Supreme Court emphasized that an attorney-fee award must take into account the particular circumstances of a case. In fact, *Smith* even cited *Smolen* for this very proposition. See *Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.), citing *Smolen*, 186 Mich App at 297. And *Smith* stands for the proposition that the trial court has discretion to adjust the starting point amount depending on pertinent factors; this is in stark contrast to the starting point at issue in *Smolen*, in which the plaintiffs asked this Court to adopt a relatively inflexible and presumptively reasonable starting point, and to declare that they were entitled to certain adjustments, rather than leaving adjustments to the discretion of the trial court. In other words, we find that the starting point rejected in *Smolen* was much different than the starting point adopted in *Smith*. For this reason, we decline to read *Smolen* as prohibiting application of the *Smith* framework to cases involving an award of attorney fees under the MCPA.

In addition to finding no authority that would prevent the application of *Smith* to the instant case, we conclude that the purposes of the fee-shifting provisions in the MCPA and the MA are best served by applying the *Smith* framework to an award of attorney fees under those statutes. "One of the purposes behind both the [MMWA] and the MCPA is to provide, via an award of attorney fees, a means for consumers to protect their rights and obtain judgments where otherwise prohibited by monetary constraints." *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97-98; 537 NW2d 471 (1995). The MMWA and MCPA are remedial in nature and must be liberally construed in order to achieve their intended goals. See *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993). We have recognized that fee-shifting provisions "are essential to legal redress in public interest or consumer cases in which the monetary value of the case is often meager." *LaVene*, 266 Mich App at 476. As explained in *Jordan*, 212 Mich App at 98-99:

[14] And to the extent that the holdings of the cases conflict, we would be bound to follow *Smith* rather than *Smolen*. See *Charles A Murray Trust v Futrell*, 303 Mich App 28, 48-49; 840 NW2d 775 (2013) (this Court is bound by the decisions of our Supreme Court).

> In consumer protection as this, the monetary value of the case is typically low. If courts focus only on the dollar value and the result of the case when awarding attorney fees, the remedial purposes of the statutes in question will be thwarted. Simply put, if attorney fee awards in these cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. Thus, practically speaking, the door to the courtroom will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would indeed be ironic: it is precisely those with ordinary consumer complaints and those who cannot afford their attorney fees for whom these remedial acts are intended.

Still, that is not to say that in MCPA or MMWA cases, a court should award the full amount of requested fees. *Id*. at 99. Rather, a court is to consider "the usual factors," and "must also consider the special circumstances presented in this type of case." *Id*. In *Jordan*, this Court concluded that the trial court abused its discretion when it failed to consider the goals of the MCPA and the MMWA and limited the plaintiff's attorney fees based solely on "the result obtained and the low value of the case." *Id*. at 98.

The remedial nature of the MCPA and the MMWA, and the policy choices behind awarding attorney fees under those statutes, support our decision to impose the *Smith* framework in this case. As recognized by this Court in *Jordan*, 212 Mich App at 98, consumer protection cases require a "reasonable return" in order to assure that consumers can retain competent counsel to pursue claims that promise meager monetary returns. Failing to provide this reasonable return to "ordinary consumer complaints" effectively closes the courtroom door on the class of persons to whom the Legislature and Congress expressly sought to provide protection. See *id*. at 98-99. In order to honor the intent of the fee-shifting provisions found in the MCPA and the MMWA to assure a "reasonable return," we find it prudent to operate under the *Smith* framework, which begins with the product of a reasonable hourly fee and a reasonable number of hours expended, and makes adjustments based on a number of factors. We believe this starting point helps frame the attorney-fee award in the proper context and helps avoid focusing too heavily on the results obtained or the low value of the case. This approach uses a reasonable number of hours—not the actual number of hours or a number that encourages a plaintiff's counsel to bill excessively based on the promise of an attorney-fee award—as the starting point for the fee analysis and helps shift the focus away from an attorney-fee award that is overly dependent on the outcome achieved. In other words, we believe that this approach best comports with the legislatively sanctioned goal of incentivizing competent counsel to litigate consumer protection cases. At the same time, this approach ensures that trial courts have appropriate control over the ultimate award of fees. And just as in *Smith*, we believe that using this approach will lead to more consistency in awards under the MCPA and the MMWA. See *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.) (having the trial court consider the amount of money calculated by multiplying a reasonable number of hours by the customary fee charged in the same area for similar legal services, will result in greater consistency in awards.). This is not to say, however, that a trial court should simply award the amount of fees requested by a party, without any critical examination. *Jordan*, 212 Mich App at 99. Rather, we find that the framework set forth in *Smith* is the most appropriate framework for honoring the remedial

purpose of the MCPA and the MMWA, and for achieving the goal of awarding a reasonable fee in these types of cases.[15]

C. THE TRIAL COURT ABUSED ITS DISCRETION

Having determined that the *Smith* framework applies, we next turn our attention to the trial court's award of attorney fees in this case. After reviewing the trial court's award, we find that the court abused its discretion when it awarded $1,000 in costs and attorney fees to plaintiff's counsel. The court gave no consideration to the vast majority of the pertinent factors, and instead, appeared to focus myopically on the amount obtained by plaintiff, describing the case as a "nickel and dime" case.[16] This was inconsistent with the remedial goals of the MCPA and the MMWA. See *Jordan*, 212 Mich App at 98 (reversing and remanding for further proceedings when the trial court's only justifications for limiting the plaintiff's attorney fees were the result obtained and the low value of the case). See also *Smolen*, 186 Mich App at 296 (reversing the trial court's award of attorney fees because the trial court did not consider any of the *Wood* factors). In addition, the court chastised plaintiff's counsel at the end of the hearing for attempting to clarify the record and for filing what it termed "pages and pages of stuff."[17] Further, as noted, the trial court appeared to express doubt about whether plaintiff was even entitled to attorney fees, which was incorrect. Accordingly, we are compelled to vacate the trial court's award of attorney fees and to remand the case to the trial court so that it may employ the proper procedures to its determination of the attorney-fee award.

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[15] In this regard, we note that as is the case with most fee-shifting statutes, there is a punitive nature to the award of attorney fees under the MCPA and the MMWA. Indeed, although the statutes are designed to protect consumers, the award of attorney fees acts, in some ways, as a penalty against those who have violated the respective acts. In *Smith*, 481 Mich at 527-528 (opinion by TAYLOR, C.J.), our Supreme Court noted that the "purpose" of the fee-shifting provision of MCR 2.403(O)(6) was to penalize parties who should have accepted a case-evaluation award, but did not. Therefore, to the extent that the punitive nature of case-evaluation sanctions was pertinent to our Supreme Court's imposition of the *Smith* framework, the attorney fees awarded in this case reflect the same punitive nature, drawing additional parallels to *Smith* and providing further support for our decision to apply *Smith* in this case.

[16] Because the court focused solely on the amount of the recovery, our decision—that the trial court abused its discretion—would be the same regardless whether we applied the *Smith* framework or the traditional multifactor analysis.

[17] While we make no comment on the reasonableness of the requested fees, we note that plaintiff, as the party requesting attorney fees, bore the burden of establishing that the requested fees were reasonable, i.e., she bore the burden of producing "pages and pages of stuff" to support the requested fees. See *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). And our review of the "pages and pages of stuff" reveals that plaintiff filed documents relating to the pertinent factors to be considered to determine a reasonable attorney fee, such as billing records, the Economics of the Law Practice Survey published by the State Bar of Michigan, as well as documents noting the experience and reputation of plaintiff's counsel.

III. CONCLUSION

In conclusion, we vacate the trial court's order awarding $1,000 in attorney fees and costs to plaintiff, and we direct the trial court, on remand, to follow the framework established in *Smith*. In this regard, the court

> should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.).]

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Stephen L. Borrello